IN THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2019-CP-40-03702

Belinda Pickens..... Appellant.

v.

United Services Automobile Association..... Respondent.

MOTION FOR CERTIFICATION BY SUPREME COURT

United Services Automobile Association ("USAA") moves pursuant to Rule 204(b), SCACR, to certify this appeal for review by the Supreme Court before it has been determined by the Court of Appeals. The case involves application of a statutorily-authorized excluded driver endorsement to uninsured motorist coverage when the named insured allows the excluded driver to operate a vehicle. On April 24, 2020, this Court entered an Order granting a petition for writ of certiorari in the case of *Nationwide Insurance Company of America v. Knight*, Appellate Case No. 2020-000026, which deals with the enforcement of an excluded driver provision in the underinsured motorist context. Because both cases deal with similar issues and arguments, USAA would respectfully request that these cases be heard together before this Court.

BACKGROUND

This case arises out of the enforcement of an excluded driver endorsement, which is titled "Voiding Automobile Insurance While Named Person is Operating Car." (Ex. A, February 12, 2020 Order, p. 1). USAA issued a personal auto policy to Belinda Pickens that listed a 1997 Chevrolet as an insured vehicle. (*Id.*). On May 1, 2008, Pickens executed an excluded driver endorsement listing her son Kevin Simms as an excluded driver. (*Id.*).

In the excluded driver endorsement, Pickens agreed USAA "shall not be liable for damages, losses or claims arising out of the operation or use of the automobile described in the policy . . . while said automobile is being driven or operated by" Kevin. (*Id.* at p. 2). Moreover, the declarations page of the insurance policy stated: "***COVERAGES EXCLUDED WHEN ANY VEHICLE OPERATED BY KEVIN SIMMS ***." (*Id.*). Thus, Pickens and USAA agreed that the coverage under the policy would not apply for claims arising when Kevin was operating a vehicle. (*Id.*).

On March 10, 2016, Pickens chose to allow her son Kevin – an excluded driver– to operate the 1997 Chevrolet with Pickens as a passenger. (*Id.*). At that time, Kevin was uninsured. (*Id.*). A collision occurred caused by another uninsured motorist and injuring Pickens. (*Id.*). Despite having executed the excluded driver endorsement and allowing her excluded driver son to operate her vehicle, Pickens sought uninsured motorist ("UM") coverage under the USAA policy. (*Id.*). Because the policy excluded coverage while Kevin was operating a vehicle, USAA filed this declaratory judgment action. The parties admit that Kevin was an excluded driver, that Pickens signed the named driver exclusion, and that Kevin was operating a vehicle at the time of the accident. (*Id.*).

Pickens argued that the named driver exclusion only applied to liability coverage. (*Id.* at p. 4). Noting that the South Carolina Court of Appeals had rejected this same argument in *Nationwide Ins. Co. v. Knight*, 428 S.C. 451, 835 S.E.2d 538 (Ct. App. 2019), the Circuit Court granted USAA summary judgment. (*Id.* at pp. 4, 7). Like the Court of Appeals in *Knight*, the Circuit Court held that none of the coverage in the policy was in effect while the vehicle is operated by an excluded driver. (*Id.* at p. 4). Pickens appealed the judgment, filing her Notice of Appeal on March 10, 2020. (Notice of Appeal). At this time, no briefing has been filed with the Court of Appeals.

ARGUMENT

"Certification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance." Rule 204(b), SCACR. By granting the petition for a writ of certiorari in *Knight*, this Court has already indicated it believes application of the named driver exclusion to uninsured or underinsured motorist coverage is worth addressing. Moreover, this case and the previously-accepted *Knight* case involve similar issues of whether uninsured motorist ("UM") coverage or underinsured motorist ("UIM") coverage is available when an excluded driver is operating a vehicle at the time of an accident. Both the Circuit Court in this case and the Court of Appeals in *Knight* reached the same conclusion – coverage under the policy is not in effect while the vehicle is operated by an excluded driver. Variations of potential facts help provide context to this Court's analysis and decisions. By evaluating this case at the same time it considers the *Knight* case, this Court will have another set of facts to consider. USAA respectfully requests that these similar cases be heard together before this Court.

A. Certification would promote judicial efficiency because a case involving a similar issue is currently pending before this Court.

The South Carolina judicial process values efficiency and finality. *See State v. Hewins*, 409 S.C. 93, 109, 760 S.E.2d 814, 822 (2014) ("[T]he prompt resolution of claims and finality are

desirable goals in civil litigation."); *Davis v. Richland Cty. Council*, 372 S.C. 497, 503–04, 642 S.E.2d 740, 743 (2007) (addressing issues "[i]n the interest of judicial economy"); *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) (considering cross-appeal in the interest of judicial economy); *State v. Vick*, 384 S.C. 189, 202, 682 S.E.2d 275, 282 (Ct. App. 2009) ("[O]ur courts have at times considered an issue in the interest of judicial economy."); Rule 501, SCACR, Canon 3(B)(8). In this case, those ends are best served by the Court hearing this appeal along with the *Knight* case currently before it.

On April 24, 2020, this Court granted a petition for writ of certiorari to review the Court of Appeals' decision in *Nationwide Ins. Co. of Am. v. Knight*, 428 S.C. 451, 835 S.E.2d 538 (Ct. App. 2019). (Ex. B, April 24, 2020 Order in App. Case No. 2020-000026). In *Knight*, the Court of Appeals held that a policy with an excluded driver endorsement did not provide any UIM coverage when the excluded driver was operating a vehicle. *Id.* at 460, 835 S.E.2d at 543. Like in this case, the insured in *Knight* argued the excluded driver endorsement statute, § 38-77-340, only permits the exclusion of liability coverage. *Id.* at 457, 835 S.E.2d at 541; (Ex. A, February 12, 2020 Order, p. 4). Both the *Knight* court and the Circuit Court in this case rejected this argument. *Id.* at 459, 835 S.E.2d at 542; (Ex. A, February 12, 2020 Order, p. 4).

Under Section 38-77-340, the insurer and named insured agree "that coverage under such a policy of liability insurance shall not apply while the motor vehicle is being operated by" the excluded driver. S.C. Code § 38-77-340. The statute does not define "policy of liability insurance." However, both the court in *Knight* and court in this case recognized that the MVFRA defines "motor vehicle liability policy" as: "An owner's or operator's policy of liability insurance that ***fulfills all the requirements of Sections 38-77-140 through 38-77-230***...." *Id.* at 457, 835 S.E.2d at 541 (quoting S.C. Code § 56-9-20) (emphasis added); (Ex. A, February 12, 2020 Order, p. 5)

(emphasis in orig.) (quoting S.C. Code § 56-9-20). The respective coverages at issue in this case (UM) and the *Knight* case (UIM) are both included in "the requirements of Sections 38-77-140 through 38-77-230." *See* S.C. Code §§ 38-77-150 and 38-77-160 (the statutes providing for UM and UIM coverage, respectively). Like the court in *Knight* with UIM coverage, the Circuit Court in this case recognized that UM coverage is not a standalone coverage but, instead, part of a "policy of liability insurance." *Id.* at 458, 835 S.E.2d at 542; (Ex. A, February 12, 2020 Order, p. 5). Both Courts held that § 38-77-340 was not limited to liability coverage but applied to exclude all policy coverage when the excluded driver was operating a vehicle. *Id.* at 460, 835 S.E.2d at 543; (Ex. A, February 12, 2020 Order, pp. 6-7).

Both cases involve the applicability of the excluded driver endorsement statute to coverage other than liability coverage. Both involve overlapping legal arguments about the meaning of the statute. At this time, both cases are pending review in their respective appellate courts with briefing pending.[1] Therefore, USAA respectfully requests that the Court hears these cases together, thereby promoting judicial efficiency and consistency.

B. Certification is appropriate because this case involves a legal principle of major importance.

This case involves the meaning and application of South Carolina Code § 38-77-340, the excluded driver endorsement statute. By Order dated April 24, 2020, this Court granted the petition for certiorari in the *Knight* case. The petition stated: "The Court of Appeals Order misapprehended or misinterpreted Section 38-77-340 of the South Carolina Code of Laws which allows exclusion of *only* automobile liability insurance coverage." (Ex. C, *Knight* Petition for Writ of Certiorari, p.

[1] Initial briefs have not been filed in this case. In *Knight*, only the Petitioner's brief has been filed. Both matters are in their early briefing stages.

3). It stands to reason that by granting that petition for certiorari, this Court recognized the legal significance of addressing the meaning and application of § 38-77-340.

Moreover, this case presents important public policy considerations under South Carolina's auto insurance scheme. Accepting Pickens' argument, she would be allowed to protect herself via UM coverage when she knowingly rides as a passenger in her vehicle while it is operated by a driver she chose to exclude. While operated by the excluded driver, any member of the motoring public injured by his negligence would not be able to recover liability coverage under Pickens' policy. Despite this choice, Pickens claims she can nonetheless recover UM coverage when injured by any other motorist. Thus, Pickens claims she can allow her car to be driven with no protection for the public and yet protect herself. This absurd result exemplifies why the General Assembly chose to allow "coverage" under the insurance policy to be excluded when the excluded driver operates a vehicle instead of limiting the exclusion to "liability coverage" – a term that is not used in the statute.

South Carolina's goal in enacting the Motor Vehicle Financial Responsibility Act (MVFRA) is to require owners of vehicles to carry at least the minimum limits of insurance to protect the public. *See Lincoln Gen. Ins. Co. v. Progressive N. Ins. Co.*, 406 S.C. 534, 539, 753 S.E.2d 437, 440 (Ct. App. 2013) ("The legislation requires insurance for the benefit of the public...."); S.C. Code Ann. § 56-10-10 (requiring the owner of every vehicle registered in the State of South Carolina to maintain the security required by Section 56-10-20); S.C. Code Ann. § 56-10-20 (requiring policies "providing for at least (1) the minimum coverages specified in Sections 38-77-140 through 38-77-320 . . .."). In other words, the main goal of the MVFRA is to ensure that vehicle owners purchase insurance for their vehicles that will protect the motoring public. The excluded driver endorsement statute creates an exception to this requirement. *See*

Lincoln Gen. Ins. Co., 406 S.C. at 541, 753 S.E.2d at 441. It allows the vehicle owner to name a particular person as an excluded driver and provides that the coverage under the policy "shall not apply" when the excluded driver operates the vehicle. S.C. Code § 38-77-340.

By executing the excluded driver endorsement, the vehicle owner pays a lower premium for the policy and the motoring public is no longer protected under the policy when a vehicle is operated by the named excluded driver. *See Lovette v. U. S. Fid. & Guar. Co.*, 274 S.C. 597, 600, 266 S.E.2d 782, 783 (1980) (stating purpose of excluded driver statute is to "alleviate the problem often faced by the owner of a family policy, who... is forced to pay higher premiums because another member of the family...is by definition also included in the policy coverage"); *Lincoln Gen. Ins. Co.*, 406 S.C. at 541, 753 S.E.2d at 441 ("[A]n insurer's obligation to provide minimum limits for 'insureds' is inapplicable when the person named in the endorsement is driving."). As the Circuit Court held, if the vehicle owner can pay a reduced premium and yet still protect herself as a passenger in her vehicle while operated by the excluded driver, then an owner has a perverse incentive to exclude all members of her household. It is a legal position that actually harms the public by incentivizing the exclusion of drivers to create lower premiums. The Circuit Court in this case and the Court of Appeals in *Knight* correctly read the statute in a way that promotes – rather than harms – the purpose of the MVFRA by holding that all coverages under the policy are not in effect while the vehicle is operated by an excluded driver.

Furthermore, this meaning and application of the statute incentivizes vehicle owners to properly use the excluded driver endorsement statute. Under the statute, the named person can be excluded from the policy **but only if**:

> the named insured declares in the agreement that (1) the driver's license of the excluded person has been turned in to the Department of Motor Vehicles or (2) an appropriate policy of liability insurance

> or other security as may be authorized by law has been properly executed in the name of the person to be excluded.

S.C. Code § 38-77-340. In the first instance, the excluded driver is not legally allowed to drive and, consequently, should not be a vehicular danger to the public or to the vehicle owner. In the second instance, the public and vehicle owner should be protected under the driver's separate liability policy.

The insurer has no duty to investigate these representations by the vehicle owner.[2] *United Fin. Cas. Co. v. Bostic*, 782 F. Supp. 2d 179, 181 (D.S.C. 2011). By rendering coverage under the policy void while a vehicle is operated by the excluded driver, the legislature has incentivized the vehicle owner both to be truthful in these representations and to not allow an unlicensed driver to operate the owner's vehicle. As demonstrated by this case, the consequence for making an untruthful representation to obtain a lower premium is that the vehicle owner has no protection for herself when she allows an excluded, uninsured driver to operate her vehicle. The Circuit Court's holding in this case and Court of Appeal's holding in *Knight* harmonize the goals of the MVFRA and the excluded driver endorsement statute. Certification of this case is appropriate because this case involves a legal principle of major importance, namely the meaning and application of the excluded driver endorsement statute within the MVFRA legislative scheme.

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[2] In a previous version of the statute, the insurer was required to confirm the veracity of the statement. However, the statute was amended to only require that the insured make the required declaration, thus placing the consequences of a misrepresentation on the insured instead of the insurer. *See Thao v. Nationwide Affinity Ins. Co. of America*, 2018 WL 2971784 (D.S.C. June 13, 2018) (analyzing statutory history of § 38-77-340 and holding "by the plain terms of the statute, the named driver exclusion is enforceable so long as the insured makes the declaration" regardless of the veracity of the insured's representations).

C. Certification is appropriate because this case involves an issue of significant public interest.

The issues in this case affect the risk v. reward assessment for a named insured using an excluded driver endorsement. Can a vehicle owner use an excluded driver endorsement to lower her premium payments (at the expense of protection for the public) and still have the right to protection for herself under that policy when the excluded driver is operating the vehicle? If yes, then an insured has a high incentive to exclude members of her household. If no, then it makes better sense to only use the exclusion for non-drivers or persons with their own policies of liability insurance. Therefore, this case involves a significant issue of public policy, namely the factors insureds should consider when purchasing a family auto policy.

Additionally, the plain language of the excluded driver endorsement in this case states that it excludes coverage when the excluded driver is operating the vehicle. (Ex. A, February 12, 2020 Order, p. 1). If an insurer is not allowed to exclude the coverage provided under the policy – which includes uninsured, underinsured, comprehensive, collision, med pay, and/or liability – when the excluded driver is operating the vehicle, this would increase the cost of premiums for policies with named driver exclusions in this State. Lower premiums were the reason for the enactment of the excluded driver endorsement statute in the first place. *See Lovette*, 274 S.C. at 600, 266 S.E.2d at 783 (stating purpose of excluded driver statute is to "alleviate the problem often faced by the owner of a family policy, who... is forced to pay higher premiums because another member of the family...is by definition also included in the policy coverage"); *Lincoln Gen. Ins. Co.*, 406 S.C. at 541, 753 S.E.2d at 441 (same). Consequently, this case involves an issue of significant public interest and should be certified.

CONCLUSION

Because this appeal involves a legal principle of major importance, issues of significant public interest, and similar issues to those in a case pending before this Court, USAA hereby respectfully requests this Court to grant its motion to certify this case for review and hear this case with the currently-pending *Nationwide v. Knight* case.

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Wesley B. Sawyer, Esquire
S.C. Bar No. 100229
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
wsawyer@murphygrantland.com
Attorney for Respondent